

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-47

In re Applications of

Benchmark Communications File No. BPH-891228MT
Corporation (hereafter
"Benchmark")

Hap-Hazard File No. BPH-900314MM
Broadcasting (PREVIOUSLY DISMISSED)
Company)
(hereafter "Hap-Hazard")

Larry A. Payne File No. BPH-900315MH
(hereafter "Payne") (PREVIOUSLY DISMISSED)

For Construction Permit for a New
FM Station on Channel 291C3 in
Chatom, Alabama

HEARING DESIGNATION ORDER

Adopted: May 9, 1994;

Released: May 23, 1994

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned applications for a new FM station.¹

2. *Background.* The subject allotment is intimately intertwined with the history of Station WCCJ(FM), Chatom, Alabama. The original construction permit for a new FM station on Channel 276A² in Chatom, Alabama, (BPH-840423IL) was issued to June G. Fuss on October 23, 1984, specifying a construction completion date of October 23, 1985. On June 17, 1985, the Commission granted the application (File No. BAPH-850215HK) to assign the permit of then station WDAL(FM) from Ms. Fuss to Benchmark. Benchmark received its first extension of construction permit on November 18, 1985, to expire on May 18, 1986. On April 11, 1986, Benchmark filed a counterproposal in a pending Commission rulemaking proceeding requesting that its allotment be upgraded from its current Class A to Class C2 facilities. See MM Docket No. 86-55, RM 5400, 51 Fed. Reg. 6442 (February 24, 1986). On October 6, 1987, Benchmark received its second extension (BMPH-860417JG), through April 6, 1988, based on the pending rulemaking proceeding.

3. On March 25, 1988, Benchmark applied for a third extension of the now WCCJ permit. Alabama Native American Broadcasting Company filed an objection to that extension application on May 6, 1988. The Commission requested additional information from Benchmark regarding the progress it claimed to have made toward constructing WCCJ by letter dated July 20, 1988 (reference 8920-SL), and ultimately denied the extension request and cancelled the permit for failure to comply with the strict requirements of 47 C.F.R. §73.3534. In so doing, however, the Chief, Audio Services Division, opined that:

We must also point out, however, that there appear to be several misrepresentations with respect to construction progress made by Benchmark in this case. Specifically, while Benchmark claimed in its March 25 application that a tower and mobile home to be used for studios and offices were on site with equipment installation progressing, these statements appear to be untrue. There is still no tower at the site, and no trailer arrived at least until (by Benchmark's own admission) May 16, 1988. Additionally, Benchmark claimed that the power company had begun installing a service line to the site, when no such line is in place yet, over nine months after the claim was made. We remind Benchmark that truthfulness is a key element of character necessary to operate a broadcast station in the public interest. See *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. granted in part*, 1 FCC Rcd 421 (1986). See also *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946), and *LeFlore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980). However, given the denial of the subject extension application and consequent cancellation of the WCCJ(FM) construction permit, we do not believe that further action is warranted at this time.

Letter to Benchmark Communications Corporation, reference 8920-MW (Chief, Audio Services Division, January 19, 1989). Benchmark filed a timely petition for reconsideration of this action on March 1, 1989.

4. During the pendency of the petition for reconsideration, the Commission's Policy and Rules Division finalized MM Docket No. 86-55. In the *Report and Order* in this proceeding, 4 FCC Rcd 7556 (1989), the Chief, Policy and Rules Division, wrote that

We will not consider the Benchmark counterproposal to upgrade its Channel 291A construction permit to operate on Channel 290C2. On January 19, 1989, the Audio Services Division cancelled Benchmark's underlying construction permit for Channel 291A at Chatom. As a consequence of that cancellation, Benchmark is no longer eligible to request modification of its construction permit. Moreover, in the Joint Supplemental Comments filed June 23,

¹ The applications of Hap-Hazard and Payne were dismissed on June 26, 1991. See *Letter to John R. Meyers, et al.*, reference 8920-CA (Chief, Audio Services Division, June 26, 1991.) Hap-Hazard filed a petition for reconsideration of its Dismissal on July 26, 1991, and Payne filed a similar petition on August 2, 1991. Additionally, Hap-Hazard filed a petition to deny Bench-

mark's application on April 11, 1991. Benchmark filed an opposition to the petition on April 25, 1991, to which Hap-Hazard replied on May 13, 1991.

² In order to accommodate another station's upgrade, the Commission eventually substituted Channel 291A at Chatom. See RM 4929, MM Docket No. 85-387.

1989, Benchmark agrees not to pursue the Channel 290C2 allotment. Instead, Benchmark states its willingness to apply for a Channel 291C3 allotment at Chatom as a "new facility."

The *Report and Order* subsequently announced that the filing window for the Channel 291C3 allotment at Chatom would open on December 1, 1989, and close on January 2, 1990. Benchmark timely filed the instant application on December 28, 1989. However, rather than dismiss the pending petition for reconsideration of the cancellation of the WCCJ permit, Benchmark filed the application as a "minor change" to the WCCJ construction permit to implement the rulemaking (i.e., to upgrade from Class A to Class C3 pursuant to MM Docket No. 86-55). Benchmark also noted on page 1 of its application that "[s]hould pending File No. BMPH-880325JC not be granted, applicant requests that this be treated as an application for a new station." Benchmark ultimately requested dismissal of its petition for reconsideration on June 21, 1990, only after it was assured that no applicants had filed for the Channel 291C3 allotment in Chatom during the filing window announced in MM Docket No. 86-55.

5. *The Petitions for Reconsideration.* The applications of Hap-Hazard and Payne were dismissed by the Chief, Audio Services Division, on June 26, 1991, because they were filed *after* the close of the Chatom filing window and because Benchmark had filed its application, however characterized, within that window. Therefore, because "timely filed applications preclude use of the 'first-come, first-serve' processing system," see *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936, 19,941 (May 13, 1985), Hap-Hazard's and Payne's proposals were dismissed as unacceptable for filing. See *Letter to John R. Meyers et al.*, reference 8920-CA, (Chief, Audio Services Division, June 26, 1991).

6. In its petition for reconsideration, Hap-Hazard argues that the June 26, 1991 letter "completely ignored" the petition to deny it filed against Benchmark's application which "raised a number of questions about the acceptability of Benchmark's application and, additionally, about Benchmark's basic qualifications to be a Commission licensee." Petition, at 2. Essentially, Hap-Hazard states that Benchmark's application "sought a modification of a construction permit which was not, at the time the application was filed, still outstanding" and that therefore the application should have been dismissed.³ Additionally, Hap-Hazard

argues that basic qualifying issues relating to Benchmark's efforts and representations in constructing WCCJ have not been resolved.⁴ Hap-Hazard notes that the failure to resolve these character qualifications issues indicates that Benchmark's application must be designated for hearing on those issues before its proposal can be granted. Hap-Hazard indicates that "it does not believe that the public interest will be served by any further dissipation of scarce Commission resources on Benchmark." Petition, at 4.⁵

7. Payne indicates in its petition for reconsideration that, if the character issues outstanding against Benchmark remained unresolved, "Payne and Hap-Hazard, who filed in good faith, will be eliminated while Benchmark becomes a permittee with serious unresolved issues." Payne Petition, at 3. Payne also states that he relied on the Commission's data base and certain trade publications before filing his application, and these indicated that there were no applications on file for the Chatom frequency. Payne apparently believed that he was filing a risk-free application. Payne states that "the Commission acted in haste in dismissing the Payne and Hap-Hazard applications before the Benchmark issues in question are resolved."⁶

8. We believe that petitioners are incorrect in their legal and equitable arguments challenging the acceptance of Benchmark's application. Initially, Hap-Hazard claims that Benchmark's application cannot be accepted because it proposes a minor change to a permit which was not outstanding. Legally, however, this is not true. Benchmark had filed a timely petition for reconsideration of the denial of its extension and cancellation of its permit, and it had every right to prosecute that petition. Until the appeal was ruled upon, the denial and cancellation were not final Commission actions. See, e.g., *Meridian Communications*, 2 FCC Rcd 5904 (Rev. Bd. 1987), and *Word of Life Ministries, Inc.*, 3 FCC Rcd 2060 (Rev. Bd. 1988).⁷ Furthermore, while Benchmark may have been guilty of legal legerdemain in retaining its petition for reconsideration while filing the instant application and requesting that it be considered as an application for a new FM station only if the extension is ultimately denied,⁸ we assure Hap-Hazard that no benefit would accrue to Benchmark from this plan. Were any applications filed during the filing window for the new Chatom allotment, they would have been consolidated with the Benchmark application, however it was characterized, and, if acceptable, designated for comparative hearing.

³ Hap-Hazard notes the language on Page 1 of the application that the application should be treated as an application for new FM station only if the pending extension request was not granted. Hap-Hazard argues that, if Benchmark had dismissed its petition for reconsideration on or before December 28, 1989, there would be no problem. However, it states that "Benchmark chose to engage in gamesmanship apparently designed to permit it to block competition if the denial of its extension application were to be reconsidered, while still attempting to assure itself of consideration if reconsideration were denied." Petition to Deny, at 6. Benchmark, claims Hap-Hazard, "should not be permitted to benefit from its subterfuge." *Id.*

⁴ Hap-Hazard argues in its petition to deny that Benchmark also attempted to cover these outstanding character issues by providing at best a "vague, cursory and misleading summary." Petition to deny, at 8.

⁵ We will address Hap-Hazard's character allegations *infra*, during our discussion of Benchmark's proposal.

⁶ Payne notes that "there is a very good possibility that the

Commission ... will disqualify the Chatom application of Benchmark...." Payne states that the seven-day, first-come/first-serve filing window proposed in the June 26 dismissal letter for this eventuality would be "extremely unfair" to Payne and Hap-Hazard, who have spent several thousand dollars in legal, engineering and filing fees, "based on incorrect information."

⁷ Additionally, under 47 C.F.R. §1.65, an application is "pending" before the Commission from the time it is accepted for filing ... until a Commission grant or denial is no longer subject to reconsideration by the Commission or to review by any court." Thus, Benchmark's extension application was still technically pending before the agency when the instant application was filed.

⁸ The rulemaking *Report and Order* contains no indication that Benchmark indicated in its June 23, 1989 comments in that proceeding that it would withdraw its petition for reconsideration. Rather, it states simply that Benchmark "agrees not to pursue" the upgrade specified in its counterproposal. 4 FCC Rcd at 7556.

9. However, no other applications were filed during that window. Hap-Hazard and Payne both chose to wait until the close of the window before filing. Payne especially should now be aware of the risks of so doing: even if Benchmark's proposal were to be dismissed, we would not consider Payne's application, but would instead open a seven-day "mini-window," as indicated in the June 26 dismissal letter. Equitable considerations do not favor latecomers. While Benchmark's December 28 application may not have been entered into the Commission's database and processed with alacrity, both Hap-Hazard and Payne could have solidified their rights simply by filing during the pertinent filing window.

10. Finally, Payne's argument that it filed only after consulting the Commission's database and several unnamed external trade publications is misguided. The Commission has held that its database is an unofficial source of information (as are external trade publications) which should not be relied upon by applicants attempting to determine their filing rights. *See, e.g., State of Oregon Acting By and Through the State Board of Higher Education*, 8 FCC Rcd 3558, 3560 (1993). Therefore, the fact that Payne did not know of Benchmark's application is not persuasive.

11. In light of the above discussion, the petitions for reconsideration filed by Hap-Hazard and Payne will be denied below to the extent that they challenge the acceptance of Benchmark's application on procedural grounds. Moreover, we do not believe that an abuse of process issue is warranted against Benchmark for attempting to prosecute simultaneously both its petition for reconsideration and its December 28 application.⁹ The *Report and Order* in MM Docket 86-55 indicates that Benchmark informed the Commission's Policy and Rules Division that it would pursue the Channel 291C3 Chatom allotment as a new station; it did not do so, but rather pursued it as a modification until assured that it would face no mutually exclusive competition. While we do not believe that Benchmark engaged in a good-faith utilization of Commission processes, because no applications were filed during the Chatom Channel 291C3 filing window, we believe that an evidentiary hearing on this issue is pointless.¹⁰

12. *Benchmark's application.* As stated in the June 26, 1991 letter, Benchmark's application meets the Commission's legal and technical criteria and was properly found to be acceptable for filing. However, due to the unresolved matters arising out of its representations and efforts *vis-a-vis* WCCJ, additional concerns remain regarding Benchmark's basic qualifications to be a Commission licensee. The January 19, 1989 letter denying Benchmark's third extension and cancelling the WCCJ permit indicated that Benchmark

appeared to have made several misrepresentations with respect to construction progress, but that no further action was warranted due to cancellation of the WCCJ permit. However, on May 4, 1989, Benchmark filed an application (File No. BPH-890504ME) for a new FM station in Highlands, North Carolina. The WCCJ construction matters were raised in that proceeding, and the following issues were designated against Benchmark:

1. (a) To determine, in connection with the matters discussed in paragraph two, above, whether Benchmark made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission, or attempted to deceive or mislead the Commission;

(b) To determine, in light of the evidence adduced pursuant to issue (a) above, whether Benchmark possesses the basic qualifications to be a Commission licensee.

Mountain High Broadcasters, Inc., 6 FCC Rcd 3 (M.M. Bur. 1991). Based upon the specification of these issues, the Chief, Audio Services Division, stated in the June 26, 1991 letter that action on Benchmark's Chatom application would be held in abeyance pending determination of its basic qualifications in the Highlands proceeding.¹¹ Regrettably, Benchmark had previously declined to participate in the Highlands proceeding, and its application was dismissed for failure to prosecute. *Memorandum Opinion and Order*, FCC 91M-1391, Mimeo No. 4019 (Judge Joseph P. Gonzalez, April 23, 1991). Thus, there will be no resolution of the specified issues in the Highlands proceeding. Since the issues remain unanswered, they will be specified and tried in this proceeding.¹²

13. One additional character matter must be addressed. Benchmark submitted the following discussion of the WCCJ construction permit in Exhibit I to its application:

[Benchmark] was granted a transfer of ownership of the construction permit for WCCJ... Unable to complete construction before its last permit expired, Benchmark filed for an extension to its construction permit in a timely manner. However, certain events that were to have taken place between the time the application was prepared and filed and the expiration of the construction permit failed to materialize. A party disinterested in the existing authorization but mutually exclusive to a pending upgrade request alleged that a misrepresentation had occurred when

⁹ Benchmark's proposal cannot be considered a "contingent application" under 47 C.F.R. §73.3517 or an inconsistent application under 47 C.F.R. §73.3518. Processing of the application is not conditioned upon or inconsistent with action on any other proposal: we could consider the application irrespective of whether or not the petition for reconsideration of the cancellation of the WCCJ permit was granted. It is simply the characterization of the application which Benchmark makes contingent.

¹⁰ Were any mutually exclusive applications filed during that window, however, such an issue may have been appropriate. Benchmark prosecuted its petition for reconsideration only until it was assured that it would face no competition for the Channel 291C3 facility. Such action appears to be designed to frustrate and obstruct the prosecution of competing applica-

tions. *See, e.g., Rocket radio, Inc.*, 35 RR 2d 399, 405 (Rev. Bd. 1975).

¹¹ This holding was made pursuant to *Policy Regarding Character Qualifications of Broadcast Licensees*, *supra*, 102 FCC 2d at 1225, which states that when an application is set for hearing on character issues and the applicant has no other stations, the Commission may make any subsequent applications subject to the outcome of the pending proceeding.

¹² In the pleadings responsive to Hap-Hazard's petition to deny -- Benchmark's opposition and Hap-Hazard's reply -- the parties attempt to re-litigate the issues surrounding construction of WCCJ and Benchmark's representations regarding that construction. Because we must specify the unresolved issues relating to those matters for hearing here, we will not consider the these arguments.

Benchmark indicated that events reported in its application for additional time had taken place when they had not. Benchmark believed these events would be completed by the end of the existing construction period. When they did not occur, Benchmark immediately amended the application and stated the nature of the discrepancies and the steps it took to correct them. Without reaching the allegations of misrepresentation, the Commission denied the extension application for lack of adequate construction progress. Benchmark has requested reconsideration of that action.

In its original petition to deny Benchmark's application, Hap-Hazard states that this synopsis is "vague, cursory and misleading." While we agree that Benchmark's submission does not properly characterize the Audio Services Division's January 19, 1990 letter -- the misrepresentation allegations were considered, although no action was taken because the permit was cancelled -- we do not believe that the mischaracterization itself amounts to an additional attempt at misrepresentation. However, under 47 C.F.R. §1.65, applicants are responsible "for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application." Benchmark clearly failed to comply with this requirement because, *inter alia*, it did not amend its Chatom proposal to indicate either (i) the specification of the issues in the Highlands proceeding, or (ii) the dismissal of its Highlands application without resolution of the issues specified therein. Irrespective of whether or not the staff discovered this important information, we believe that Benchmark's overall conduct raises a substantial and material question of fact concerning whether or not it attempted to conceal data of decisional significance from the Commission. Accordingly, appropriate issues will be specified.

14. *Other matters.* Benchmark proposes to mount its transmitting antenna on a new tower. Pursuant to PST Bulletin No. 65, October 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," when work is to be performed on the tower, the transmitter power must be reduced or completely eliminated to comply with FCC guidelines. Accordingly, any subsequent grant of Benchmark's application will be subject to the following condition:

The permittee/licensee must reduce power or cease operation as necessary to protect persons having access to the site, tower, or antenna from radiofrequency radiation in excess of FCC guidelines.

15. Except as may be indicated by any issues specified below, the applicant is qualified to construct and operate as proposed. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, Benchmark's application IS DESIGNATED FOR HEARING IN A PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, in connection with the construction of WCCJ(FM), Chatom, Alabama, and with the representations made on those matters in the instant

application, whether Benchmark made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission, or attempted to deceive or mislead the Commission;

2. To determine whether Benchmark violated Section 1.65 of the Commission's Rules and or lacked candor, by failing to report the designation of character issues against it in the Highlands, North Carolina proceeding and/or the dismissal of its application for that frequency with unresolved character issues pending;

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Benchmark possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine, in light of the evidence adduced pursuant to the specified issues, whether the subject application should be granted.

16. IT IS FURTHER ORDERED, That the petitions for reconsideration filed by Hap-Hazard and Payne ARE DENIED.

17. IT IS FURTHER ORDERED, That the petition to deny Benchmark's application, filed on April 11, 1991 by Hap-Hazard, IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the day of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communication Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issue specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed

with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *on reconsideration*, FCC 91.154, paras. 7-8 & n.3, Appendix paras. 3 & 5, released May 15, 1991.

21. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Linda B. Blair, Assistant Chief
Audio Services Division
Mass Media Bureau